NAI YAU JUU

v.

PASDEC CORPORATION SDN BHD & ANOR

HIGH COURT MALAYA, KUANTAN
HELILIAH MOHD YUSOF J
[CIVIL SUIT NO: 22-57-1995]
1 JULY 2004

CONTRACT: *Specific performance - Sale and purchase of land - Letter from 1st defendant to plaintiff - Whether an offer or merely an invitation to treat - Whether plaintiff entitled to specific performance - Whether there was a concluded contract - Whether plaintiff had a cause of action against 2nd defendant - Whether plaintiff entitled to refund of booking fee*

CONTRACT: *Formation - Concluded contract - Sale and purchase of land - Letter from 1st defendant to plaintiff - Whether an offer or merely an invitation to treat - Whether there was acceptance - Whether there was a concluded contract*

This was the plaintiff's claim for specific performance of an agreement between the plaintiff and the 1st defendant dated 21 August 1995 for the sale of certain land by the 1st defendant to the plaintiff for the price of RM188,000, and for, or in the alternative, damages for breach of the agreement. The relevant exhibits that had to be considered were: (i) exh. P1, a letter from the 1st defendant to the plaintiff disclosing that the plaintiff had registered as an interested buyer, an invitation to the plaintiff to make a booking, and a booking fee of RM3,000 that would form part of the payment at the time the sale and purchase agreement was concluded at a date to be informed later; (ii) exh. P3, the official receipt that was issued by the 1st defendant to acknowledge the payment of RM3,000 by the plaintiff; and (iii) P4, another letter from the 1st defendant to the plaintiff containing the price of the subject matter stated at RM230,000 and an invitation to transact on a certain date and within a certain time. The plaintiff submitted that a contract had been concluded as the 1st defendant had made an offer for sale that was accepted by the plaintiff by way of the payment of RM3,000, and then completed by the issuance of the receipt. The 1st defendant, however, contended that exh. P1 did not constitute an offer but was, in substance, an invitation to treat. The main issue to be determined was whether there was a concluded contract between the plaintiff and the 1st defendant.

Held (dismissing the plaintiff's claim):

[1] On the facts of the instant case, it was decided that exh. P1 did not constitute an offer; the payment of RM3,000 did not constitute an acceptance of an offer and neither was the issuance of a receipt conduct constituting an acceptance of an offer. The combined effect of exhs. P1 and P1 was an invitation to treat in the form of a continuing option and the plaintiff did not respond to exh. P4. The plaintiff sent exh. P5, that was actually a counter-offer to exh. P4, and did not comply with the terms of exh. P4 although exh. P4 stated that the offer was valid until 14 November 1995. Hence, there was no concluded contract on 21 August 1995. (pp 326 f-h & 327 a-b)

[2] There was also nothing cogent adduced against the 2nd defendant. The 2nd defendant was then the beneficial owner of certain land in respect of which the Government of Pahang had granted permission to be developed. The 1st defendant subsequently concluded a joint venture agreement with the 2nd defendant to develop the said land. This agreement was dated 30 August 1994, but even at the date of the alleged contract (21 August 1995), there was no nexus whatsoever between the plaintiff and the 2nd defendant. (p 327 b-d)

[3] In regard to the booking fee of RM3,000 paid by the plaintiff to the 1st defendant, exh. P1 had expressly stated that the booking fee or "bayaran tempahan" was to form part of the purchase price at the time that the sale and purchase agreement was to be executed ("dilaksanakan"). Since there had been no concluded contract, the plaintiff was entitled to a refund of the booking fee. (p 328 a-b)

Case(s) referred to:

Carlill v. Carbolic Smoke Ball Co Ltd [1893] 1 QB 256 ***(refd)***
Coelho v. The Public Services Commission [1964] 30 MLJ 12 ***(dist)***
Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor Appeal [1978] 2 MLJ 239 ***(dist)***
Ekchardt Marine GMBH v. Sheriff High Court of Malaya Seremban & Ors [2001] 3 CLJ 864 CA ***(refd)***
GB Parker & Ors v. Central Electricity Board [1967] 4 MC 86 ***(refd)***
Low Kar Yit & Ors v. Mohamed Isa & Anor [1963] 29 MLJ 165 ***(refd)***
Skyline Trading Co v. Tiow Yoke Lan [1969] 2 MLJ 212 ***(foll)***
Spencer v. Harding [1870] LR 5 CP 561 ***(refd)***

For the plaintiff - Kong Yit Har; M/s Siva Ram & Kong
For the 1st defendant - R Sarengapani Rajoo; M/s Vendargon & Partners
For the 2nd defendant - Ramachelvam M; M/s Rama-Rozi Assoc

Reported by Suresh Nathan

JUDGMENT

Heliliah Mohd Yusof J:
The plaintiff's claim for specific performance were as follows:

(a) Perlaksanaan spesifik perjanjian antara Plaintif dan Defendan bertarikh 21.8.1995 untuk penjualan oleh Defendan kepada Plaintif harta tanah di bawah keterangan H.S.(D) 2247, P.T. No: 8772, Bandar Pekan atas harga jualan RM188,000.00.

(b) Selanjutnya atau dalam alternatif, gantirugi untuk memungkir perjanjian.

Gareth Jones & William Goodhart on Specific Performance (Chap 1 p. 1) states:

> Specific performance is an equitable remedy for the enforcement of contracts and consequently a court has no jurisdiction to grant specific performance **if no contract is entered into**. (emphasis added)

Is There A Contract
The plaintiff relied on exh. P1. It is necessary to reproduce the contents of this letter as they are material to the submission of the plaintiff:

P1: PASDEC CORPORATION SDN BHD.

Bil : (2)dlm PASDEC/M/PJ-500/PKP-TEMPAH

Tarikh: 14hb Ogos, 1995

EN. NAI YAU JUU
NO: 3 TINGKAT 1 WISMA BENDAHARA
JALAN ENGKU MUDA MANSUR
26600 PEKAN
PAHANG DARUL MAKMUR A.R. REGISTERED

Tuan/Puan,

PUSAT KOMERSIL PEKAN – TAWARAN TEMPAHAN

Dengan hormatnya perkara di atas dirujuk.

Terima kasih di atas minat dan sokongan tuan/puan dengan **mendaftar sebagai bakal pembeli projek** PUSAT KOMERSIL PEKAN.

Sehubungan dengan ini tuan/puan dijemput hadir **untuk membuat tempahan pada** 21hb Ogos 1995, masa dari 8.30 pagi hingga 4.00 petang, bertempat di alamat Kaunter Promosi dan Jualan PASDEC, G-20 Menara Teruntum, Jalan Mahkota, 25000 Kuantan, Pahang.

Bayaran tempahan sepertimana berikut perlu dijelaskan semasa pemilihan lot iaitu RM3,000.00 bagi jenis 2 Tingkat dan RM5,000.00 bagi jenis 3 Tingkat. Tempahan adalah berdasarkan "FIRST COME FIRST SERVE" atau tertakluk kepada kekosongan lot yang masih ada.

Sila maklum bahawa **bayaran tempahan ini akan dikira sebagai sebahagian daripada bayaran semasa perjanjian jualbeli dilaksanakan pada satu tarikh yang akan diberitahu kelak.** (emphasis added.)

Sekian, terima kasih.
Saya dengan hormatnya,

b/p PENGARAH EKSEKUTIF

T.T
SHARIFUL AKHTAR
Pengurus Pemasaran.

The contents of this letter were noted. Exhibit P1 disclosed that the plaintiff had registered as an interested buyer (para 1 of exh. P1). The plaintiff was invited "untuk membuat tempahan pada 21 August 1995". There was also a payment termed "bayaran tempahan" (booking fee) and that payment would form part of the payments at the time the sale and purchase agreement were to be concluded at a date to be informed "dilaksanakan pada satu tarikh yang akan diberitahu kelak." The word "dilaksanakan" is a loose phrase. It may mean "execution" or "implemented". Nevertheless the last paragraph indicated that there was another document to be dealt with.

Exhibit P1 had to be examined together with exh. P3 that is the official receipt that was issued to acknowledge the payment of RM3,000. Exhibit P3 stated the purpose of payment as "Tempahan Lot 9 Kedai 2 Tingkat Pusat Commercial Pekan". Again the term "tempahan" suggested that a booking could be made.

If as alleged by the plaintiff there was a contract concluded then it had to be 21 August 1995. However what had been disputed were the nature and contents of certain documents which were alleged to have accompanied exh. P1. These documents were the following exhibits:

(i) P1 (c) which was really a flyer or brochure giving a general description of the project referred to as Pusat Komersial Pekan.

(ii) P1 (a) layout plan indicating the premises;

(iii) P1 (b) which listed the prices of the lots including the lot selected by the plaintiff.

The specific point on the price list would be dealt together with the question of the evidence of the witnesses for the plaintiff.

The plaintiff then received on 21 October 1995 another letter from the first defendant. It is also necessary to reproduce the contents *verbatim* as follows:

Exh. P4 **PASDEC CORPORATION SDN BHD**

Bil: (3)dlm.PASDEC/M/PJ-500/PKP-JUAL/KEDUA/K9

Tarikh: 21hb Oktober, 1995 A.R. REGISTERED

EN. NAI YAU JUU
NO: 3 TINGKAT 1
WISMA BENDAHARA (LOT 1808)
JALAN ENGKU MUDA MANSUR
2660 PEKAN.
PAHANG DARUL MAKMUR

Tuan/Puan,

PUSAT KOMERSIL PEKAN – TAWARAN JUALAN LOT NO: K-9 HARGA: 230,000.00

Dengan segala hormatnya perkara di atas dirujuk.

2. Sehubungan itu tuan/puan dijemput hadir untuk **urusan perjanjian** jual beli pada 1hb. November, 1995, masa dari 8.30 pagi hingga 4.00 petang, bertempat di alamat kaunter Promosi dan Jualan PASDEC, G-20, Menara Teruntum, Jalan Mahkota, 25000 Kuantan, Pahang Darul Makamur.

3. Untuk makluman tuan/puan pihak pengurusan kami telah menetapkan harga **baru bagi prolek ini iaitu dari RM218,500.00** (jenis kedai/pejabat dua tingkat) dan dari RM351,500.00 (jenis kedai/pejabat tiga tingkat).

4. **Tawaran ini sah sehingga 14hb. November, 1995** atau selagi kekosongan masih ada.

5. Bayaran

5.1. Bayaran tempahan yang terjelas sebelum ini akan dikira sebagai sebahagian daripada bayaran guaman.

5.2 Bayaran tempahan akan lelap jika sekiranya tuan/puan membatalkan pembelian setelah surat perjanjian jual beli ditandatangani.

5.3 Bayaran-bayaran yang perlu dijelaskan adalah seperti yang dilampirkan.

Sila hubungi pihak kami sekiranya terdapat sebarang kemuskilan.

Sekian, terima kasih.

Saya dengan hormatnya,
b.p. PENGARAH EKSEKUTIF.

T.T.

SHARIFUL AKHTAR
Pengurusan Pemasaran.

s.k. (1) Pengurusan Pentadbiran & Kewangan.
PASDEC CORPORATION SDN. BHD.
Tetuan Zuki Ghandhi & Amin
No. 82-84, Jalan Telok Sisek,
25000 Kuantan.

(emphasis added)

As with exh. P1 certain particulars about exh. P4 were also noted. They were as follows:

(i) The subject matter was stated as "Tawaran Jualan" with the price stated at RM230,000;

(ii) Paragraph 2 of exh. P4 stated that the plaintiff was invited for a transaction ie, "urusan perjanjian jual-beli" on a certain date, that is 1 November 1995 and within a certain time;

(iii) A price increase was stated starting from RM218,000 (for double-storey premises and RM351,000 (for triple-storey premises).

The letter also stated that the offer was valid until 14 November 1995 or until such time when vacant lots were still available.

Para 5.2 of exh. P4 also mentioned that the deposit would be forfeited in the event the purchaser revoked (membatalkan) the purchase after the sale and purchase agreement was concluded.

Para 5.3 also referred specifically to an attachment as follows:

5.3 Bayaran-bayaran yang perlu dijelaskan adalah seperti yang dilampirkan.

The phraseology in the two namely exh. P1 and P4 therefore differed in terms. What was alleged however was that exh. P1 was accompanied by a price list and this was disputed.

Counsel for the first defendant had contended that exh. P1 did not constitute an offer but was in substance an invitation to treat. There was therefore here a question of whether there was any evidence of intention that exh. P1 was intended to be binding. *Chitty on Contracts* had pointed out that when parties negotiate with a view to making a contract many preliminary communications may pass between them and it is therefore not necessarily always the case that a definite offer was made.

In the circumstances of the case there was a further need to examine what is termed as a unilateral contract. Unilateral contract can be drawn from advertisements but even in advertisements where a house is advertised there is often further bargaining. The parties may legitimately also wish to ascertain that the other party is also financially able to undertake the transaction.

The case of *Carlill v. Carbolic Smoke Ball Co. Ltd* [1893] 1 QB 256, has always served as an example where clear terms could constitute an offer. Various interpretations may also be given to a contract of carriage when tickets are offered for sale. In this instance it is useful to revisit the *Carbolic* case: 'The defendant issued an advertisement promising to pay £100 to any person who used a carbolic ball made by them in accordance with certain directions and then caught influenza. This was held to be an offer, the defendant's intention to be bound being made particularly clear by their statement that they had deposited £1000 with the bankers "showing our sincerity in the matter".

In advertisements a seller circulating a price list or other promotional materials giving particulars of the products for sale is usually also said not to be making an offer. Even if the word "offer" were to be used as in the case of *Spencer v. Harding* [1870] LR 5CP 561 it was held that a circular stating that "we are instructed to offer to the trade for sale certain described goods" was merely an invitation to treat and not an offer capable of acceptance.

The case of *Ekchardt Marine GMBH v. Sheriff High Court of Malaya Seremban & Ors.* [2001] 3 CLJ 864 also dealt with advertisements. The facts as found in the head notes stated:

The sheriff of the Seremban High Court had arrested a motor vessel at Port Dickson and later put it up for sale by way of an advertisement. The appellant sent an offer to the sheriff together with a letter and a banker's draft for 10% of the purchase price. The letter made it clear that the offer was on the sheriff's terms, but subject to two conditions: that the port authority did not require any repairs to be done to the vessel and that the vessel could leave on its own power on the basis of a seaworthiness certificate issued by an appointed surveyor of the underwriters. The sheriff accepted the appellant's offer, which was below the advertised price, and took out a summons seeking leave of the judge to conclude the sale. The judge directed the sheriff to take steps to ensure that the conditions attached to the appellant's offer were satisfied. The sheriff made the relevant inquiry. The result was a reply from the Marine Department at Port Klang, which satisfied the two conditions imposed by the appellant. The judge then approved the sale and the appellant became obliged to pay the balance of the purchase price within the time stipulated, but it failed to do so and its deposit was forfeited. It then applied to the judge for the release of the deposit, alleging that no binding contract had been concluded between the parties. The judge held against the appellant. The issue on appeal was whether there was a valid and binding contract between the appellant and the sheriff of the High Court at Seremban.

It was held, *inter alia*, that:

(1) There was not doubt that the sheriff's advertisement amounted to an invitation to treat. It was the appellant who had made a conditional offer by way of its letter in question.

The case of *Low Kar Yit & Ors. v. Mohamed Isa & Anor* [1963] 29 MLJ 165 FC could also be referred to. Gill J (as he then was) examined in great length the nature and purport of documents which were exchanged between parties.

The offer in this case was contained in the option granted by the defendants to Mohamed Yusuff. Mr. Ramani's contention on behalf of the plaintiffs is that the option coupled with the letter of 21st January, 1961, whereby notice of exercise of the option was given, constituted a concluded agreement between the parties. His argument is that an offer is to be distinguished from an option and in support of this argument he quoted the following passage from *Salmond and Williams on Contracts* (2nd Edition), section 46, page 133:

> The consideration given by the option-holder deprives the grantor not merely of the right to revoke the option lawfully, but of his power to revoke it effectively. Notwithstanding any such wrongful revocation, the option may be exercised, and the conditional contract already constituted by the grant of the option will become *ipso jure* an absolute contract by the fulfillment of the condition.

Mr. Ramani's contention would be correct if there had been no condition stipulated in the option itself as regards a formal contract to be drawn up and agreed upon by the parties. Indeed if this were to be the only contention relied upon by Mr. Ramani the matter could be disposed of on a preliminary question as to whether the condition as to the drawing up of a formal contract goes to the root of the matter, but Mr. Ramani is not resting his case solely on this ground.

Mr. Ramani's second argument, which he has put forward with a great force and persuasiveness, is that where the essential elements of the agreement, such as the parties to the agreement, the thing to be sold and the price to be paid, can be gathered from the document which passed between the parties in the course of their negotiations for the sale and purchase of land, such documents will not the less constitute an agreement in the full sense between the parties merely because it is within the contemplation of the parties that there shall be a subsequent and formal contract. The leading Indian case which Mr. Ramani cited in support of this argument is the case of *Govind Luxman Gokhale v. Harichand Mancharan* (1). As the decision in this case was based on the general rule of construction as laid down by the House of Lords in *Rossiter v. Miller* (2), it would be more convenient to refer to that case first.

The appeal to the House of Lords in *Rossiter v. Miller* arose out of an action for specific performance brought by the vendor of certain property against the purchaser. The main question in the case was whether there was in point of fact a concluded contract between the parties. The facts of the case were as follows. An estate was offered for sale in lots shown upon a plan on which various conditions were printed. After the conditions came to the following clause:

> Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of 10% on the amount of the purchase money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract.

Miller made a verbal offer to White, the agent of the owners, to purchase certain lots for £1,000. White informed him that he must purchase subject to conditions, and promised to lay his offer before the proprietors. Shortly afterwards White wrote to Miller saying that the proprietors accepted Miller's offer to purchase the specified lots for 21,000, subject to conditions on the plan, and that he had requested the solicitors to forward to Miller the agreement for purchase. Miller replied by letter that his offer had better be re-considered unless he was left at liberty to build or not as he pleased. White replied by letter that the acceptance by the proprietors was not conditional and that Miller would be at liberty to build or not. The contract was sent to Miller but he refused to sign it or to proceed with the purchase. On those facts the Master of the Rolls held at the trial of the action that

there was a contract. On appeal to the court of Appeal it was held that on the true construction of the documents the signing of a formal contract was a condition precedent to the parties being bound. Baggallay LJ said in the course of his judgment:

> The case comes within the principle laid down by Lord Westbury in *Chinnock v. Marchioness of Ely* (3), that if an assent to be given subject to a provision as to a contract, the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

On further appeal to the House of Lords it was held that what had taken place by the correspondence constituted a complete contract between the parties and that under such circumstances the execution of a formal deed was not necessary. The Lord Chancellor (Lord Cairns) said:

> I pause there for the purpose of pointing out to your Lordships that in these conditions there are to be found the terms – and the detailed terms – of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. There is no doubt a stipulation that the purchaser would be required to sign a contract embodying these conditions. That is an obvious and natural term, because the contemplation is that persons will come in and will make offers of the price which is required for the plots, and at that point the persons so offering will not be bound by anything; it will be necessary to bind them, and therefore they are told, beforehand, that at the time when their offer is accepted, or along with the acceptance of it, the matter will not be allowed to rest *in dubio*, or without legal obligation, but that they will be required to sign something which will bind them. But they are also told what they will be required to sign; it will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract as to which the vendors are content, beforehand, to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape. That is what is stated to the purchasers by this printed form of conditions.
>
> ...
>
> My Lords, I have only to say that – but that I have found the learned Judges in the Court of Appeal, for whose opinion I have the greatest respect, taking a different view – I should have said that a clearer and simpler case of an offer made and accepted by a correspondence consisting of no more than three letters I have seldom seen. Every term is made clear, by reference to an elaborate scheme of conditions

under which the sales were to be made. The offer is recognized in terms by the person who had made it, under his hand, and it is accepted without the possibility of doubt or cavil by the persons to whom the offer was made.

My Lords, the reference to the agreement in the first letter is, I think, exactly what you might have expected to find. I have pointed out that at that time the purchaser was in no way bound, and therefore it was right to the vendors to call upon him for the signature of the agreement which he was bound to sign. But, as regards any legal consequence, the moment he himself had written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1987, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was to my mind perfectly indifferent whether they did so or not. If they did so, if an agreement had to be prepared and signed, it must be an agreement exactly to the effect of the terms and conditions of the paper of 1971, and no other terms and conditions could have been introduced. If other terms and conditions had been introduced, either party would have had a perfect right not only to refuse to accept those other terms, but to insist upon an agreement in the original terms of the paper of 1971.

...

My Lords, I can only say that I am willing to accept every word of Lord Westbury as there given. I assume that the construction put by him upon the letter I have quoted was proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

Lord Hatherley said:

It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the

parties to the agreement, the thing to be sold, the price to be paid, and all those matters, he clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, we will have this agreement put into due form by a solicitor. ... Both parties may desire that it shall be put into a formal to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with unity of purpose with reference to the sale and purchase by the two parties to the contract.

Lord Blackburn said:

So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.

Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one's mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. ... I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.

Lord Gordon said:

> I think that the correspondence founded on, constituted a completed contract for the purchase and sale of the lots in question, at the price stipulated, and on the conditions specified in the conditions and stipulations printed on the plan. No doubt these conditions provided for a subsequent and formal deed being executed by the parties; but that deed was only for the purpose of more formally setting forth the conditions upon which the parties had agreed. If there was anything introduced into the proposed deed, which the purchaser considered beyond the terms and conditions on which he purchased the property, he would have been entitled to object, and, if necessary, the proper terms of the deed could have been adjusted at the sight of a Court of Law. But in my view the contract between the parties was concluded by the correspondence and the conditions which were referred to and embodied in it.

Having perused the above, Gill J there held at p. 73:

> The authorities would appear to support the view that even where there is nothing in the agreement to suggest that the parties contemplate that the subsequent contract shall contain any new or different terms, nevertheless if it appears that the parties do not intend to bind themselves contractually by the agreement but only by the subsequent contract if and when they should enter into it, there will be no contract. Moreover, if the reference to the execution of the subsequent contract is in words which according to their natural construction import a condition, this will almost invariably be conclusive that the agreement itself was not intended to be a contract. To my mind this was true of this case. It will bear repetition if I say that when the actual phrase "subject to contract" is used, the courts tend to give effect to those words unless there is strong evidence to the contrary. The result is that the agreement which is made "subject to contract" is of no legal effect.
>
> Perhaps I should add that the plaintiff's in this case are asking the court to order the defendants to execute the draft agreement agreed upon, which amounts in effect to asking the court to enforce an agreement to enter into an agreement. That is an order which the court clearly has no power to make in the circumstances of the case.
>
> Mr. Ramani cited the case of *Alexander Brogden and Others v. The Directors &c. of the Metropolitan Railway Company* (19) as an authority for the proposition that circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either and that in such a case the word "approved" written by one of the parties at the end of the draft agreement must be taken as an approval of the substance of the draft. The short answer to that is that there is no evidence in this

case that the defendants wrote the word "approved" at the end of the draft agreement. There is also no evidence that the defendants constituted their solicitors as agents for the purpose of signing the draft agreement finally agreed upon. Moreover, subsequent authorities indicate quite clearly that formal execution by the party to be charged is necessary.

Lord Greene MR in the case of *Eccles v. Bryant and Pollock, supra,* in the opening passage of his judgment said:

> This case is one of that long series of cases which no doubt will go on as long as contracts take place, in which one party to a transaction, which was intended to produce a contract and was carried on on the usual condition that it was to be subject to contract, is attempting to say that a contract came into existence at a date on which the other party says that negotiations had not yet been completed and that no binding contract had come into existence at all.

The above amply demonstrated that the exchange of documents and the circumstances under which they were made vary. An offer is an expression of willingness to a contract made with the intention (actual or apparent) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed. Here the court was not asked to construe an express agreement but under an objective test whether there was an apparent intention to be bound.

In the context of the present proceedings I did not find certain documents alleged by both parties to be really useful in the determination of whether exh. P1 showed an offer and that alleged offer was accepted by the issuance of a receipt. Exhibit P7 (Bundle A pp. 1-23) did not in my considered view constitute documents that substantiated the plaintiff's claim that exh. P1 was an offer. Firstly it was addressed as a confidential letter by a bank and on the basis of privity of contract I do not see how it amounted to a corroboration that the plaintiff had accepted an offer. It was consistent with the bank being interested in the purchaser but notable was the fact that the exh. P7 was dated 13 October 1995 and the facility offered was "Kemudahan untuk membiayai pembelian satu unit rumah kedai yang akan ditawarkan di Pusat Commercial Pekan oleh PASDEC Corporation Sdn Bhd." It was therefore more consistent with the bank offering a loan should there be a transaction of sale and purchase between the plaintiff and first defendant. Hence it was more consistent with the fact that there was yet an offer to be made to the plaintiff in respect of which a facility was being offered.

That offer of facility itself showed that in the intended purchase there were several other details and terms and conditions to be fulfilled. Exhibit P7 was copied to several other addressees and it to be noted that the defendant was not one of them. It cannot be said the exh. P7 was conduct consistent with the defendant having made an offer to the plaintiff. There was nothing to indicate at that stage what position the bank was in if indeed a contract was already concluded as at 13 October 1995.

Equally too on the part of the first defendant exh. D11 showed that there was a briefing held on 25 November 1995. It is true that exh. D12 showed some background to the chronological development of the project. It was noted however that in perusing the document which was an official document of PASDEC there is an item B8 which showed under paragraph "21 October 1995 'tawaran jualan'."

Counsel for the plaintiff had also submitted that the first defendant had evinced an intention to conclude a contract and this was reflected in the conduct of the plaintiff. Counsel relied not only on the issuance of the receipt but also adduced the evidence of PW3. It was alleged by PW3 that there was a similar "offer" received from the first defendant and that attached to the alleged offer was also the price list. It would appear that the introduction of evidence by PW3 could be intended to be on the basis of s. 14 of the Evidence Act 1980 where apparently this was an attempt to substantiate that there was here a similar intention to make an offer for sale which offer was also accepted by payment of RM3,000 and then completed by the issuance of a receipt. This argument was not found to be acceptable. There was nothing additional to prove that the conduct of the first defendant in issuing the receipt to another party had constituted an intention to manifest something binding. There was therefore here a situation which was repeated ie, a receipt was issued and it was alleged by PW3 that there was a price list attached to the letter that he received the contents of which were similar in material particulars to exh. P1. The evidence of PW4 did not really corroborate whether the price list was included although it was alleged that the letter together with the price list was sent by registered letter. This was found to be not proven for the evidence of DW3 went uncontroverted that the price list was not sent together with the letter such as exh. P1 and was in fact made available at the counter. DW2 did state that whatever was in the price list that was relied upon by the plaintiff was a tentative price as it had not been approved as suggested in Document D12 which was a document used in a briefing by the first defendant on 25 November 1995.

D12 was not a document which was made available to the plaintiff. In this document under the heading "G Isu Harga Jualan" there was a statement that PASDEC (the first defendant) had sent a letter to applicants to make bookings for lots. There was also a reference to a "tentative" price. The plaintiff himself had produced exh. P4 which was dated 21 October 1995. The whole document "D12" therefore presented certain sequence in the steps taken towards arriving at an arrangement with the prospective buyers. Having examined the document in its totality the document in fact did reveal that there was an old price and a new price. Therefore the crux of the matter was still the real purport of exh. P1 and P4 and not what the plaintiff thought it to be. The plaintiff's counsel had submitted that nowhere in exh. P1 was there a reference to a tentative price. It was found that it is true that nowhere in exh. P1 was there any suggestion that there was a statement of a tentative price. But nowhere in exh. P1 too was it stated what the price was, for the unit that was intended for the plaintiff since a selection was still to be made.

The plaintiff's counsel had relied on certain cases and two cases were specifically cited to substantiate the claim that there was already a contract concluded arising out of exh. P1 being sent to the plaintiff and the plaintiff's payment of RM3,000 as evidenced by the receipt exh. P3.

The case of *Coelho v. The Public Services Commission* [1964] 30 MLJ 12 was cited as an instance where an applicant applied for the post of Assistant Passport Officer in the then Federation of Malaya Government Oversea Mission. The post had then been advertised as follows:

> Applicants will be selected according to the following order of preference: (i) Serving Assistant Passport Officers and serving Junior Assistant Passport Officers in the Immigration Department who have had not less than 5 years' service and possess School Certificate, (ii) All serving Government Officers who have had 5 years' service and who possess School Certificate. (iii) Persons not in Government Service who have School Certificate with a credit in English, and who have attained the age of 22 but have not attained the age of 30. Salary scale $462 x 20 - 562. Officers will be eligible for overseas allowance when abroad (*in lieu* of Malayan cost of living allowance), cost of living allowance at current rates is payable for service in Malaya, (when overseas posts will be paid on approved terms. Free housing, or an approved allowance instead, will be provided. Free medical (but not dental) attention. Outfit allowances at approved rates may be claimed. Applications (those from serving officers to be submitted through Heads of Department with Confidential Reports and Record of Service) to reach the Secretary, Public Services Commission (Designate), Young Road, Kuala Lumpur, 28th February, 1957.

Coelho's case was one where the court held that the Malay Mail advertisement was an invitation to qualified persons to apply and the resulting application were offers. Ong J (as he then was) opined that the details conveyed to the applicant was an unqualified acceptance of his appointment and when the applicant submitted his application and was selected he could no longer be considered as being on probation. His Lordship held *inter alia*:

> In the construction of contracts in writing it is undoubtedly true that the intention of the parties must be objectively sought from the writings themselves. The Malay Mail advertisement was an invitation to qualified persons to apply. The resulting applications were offers. Such offers could either be accepted simply or with the imposition of conditions as terms of the contract, additional to those set out in the advertisement. In the latter case the offers by the applicants would have been met by counter-offers which the offerers could accept or refuse. Mr. Bigley's letter did not – as a counter-offer should – ask whether it was accepted or not. In this case I am of opinion that the information conveyed to the applicant was an unqualified acceptance, and he so understood it. There was no question of his appointment being on probation, or for any period of probation.

However while counsel for the plaintiff had cited the above passages it was also noted that there were certain details about the facts of the case that certain information were not conveyed to the applicant and the information were borne out in two letters the contents of which were as follows:

> Notice of his selection by the Public Services Commission (Designate) was conveyed to the State Secretary, Perak, by a letter dated June 3, 1957 from the controller of Immigration, Federation, which was as follows:
>
> IMMIGRATION OFFICE,
> P.O. BOX 442,
> PENANG.
>
> No. IMM/HQ/28/56
> Tel: 62337
> SEC. (S) 660/57 3rd June, 1957.
>
> The Honourable
> The State Secretary, Perak, IPOH.
>
> With reference to your (93) in Pk. Sec. (s) 10/57 dated 16.3.57 forwarding an application from Mr. Meredith Coelho, Health Inspector, T. Malim, for appointment as Assistant Passport Officer in Oversea Missions of the

Federation of Malaya Government, I have to inform you that he has been selected by the Public Service Commission (Designate) for the appointment applied for.

2. He will start on the initial salary of the scale i.e. $462 p.m. **and serve a probationary period** of three years with effect from the date he assumes duty with this department (for training).

3. Will you therefore please let me know as soon as possible, when he can be released from your department to enable him to report for duty to the Deputy Controller of Immigration, Kuala Lumpur.

4. These Assistant Passport Officers are required urgently for training for duties overseas soon after Merdeka. Your co-operation in allowing Mr. Meredith Coelho early release will be much appreciated.

(Sd.) D.W. Bigley
Controller of Immigration
Federation,

c.c.
D..C.I., K.L.

The State Secretary replied to the Controller of Immigration on June 27, 1957. Copies of his letter were also addressed respectively to the Deputy Controller of Immigration, Kuala Lumpur and to the Chairman of the Tanjong Malim Town Board for their information and necessary action. On the Town Board Chairman's copy of such letter appear certain minutes addressed to the applicant by or on behalf of the Chairman on June 28, 1957, and those made by the applicant himself. The Chairman's copy of the letter is reproduced in full below:

Ref: No. (6) in T.B.T.M. 56/57

27th June, 1957.

No. (2) in Pk. Sec. (S) 660/57

Sir,

Appointment of Mr. Meredith Coelho, Health Inspector, Tanjung Malim, as Assistant Passport Officer in Oversea Missions of the Federation of Malaya Government.

I am directed to refer to your memo No. IMM/H1/28/86 dated the 3rd June, 1957, on the above subject and to inform you that Mr. Meredith Coelho will be released at the end of this month to enable him to assume duty with your Department for training with effect from 1st July, 1957.

I am, sir,
Your obedient servant,
(Sd.) Raja Abdul Aziz
for State Secretary, Perak.

The Controller of Immigration,
Federation Malaya,
P.O. BOX 442,
PENANG.

c.c.
The Dy. Controller of Immigration, Kuala Lumpur.

c.c.
The Chairman, Town Board, Tanjong Malim.
Forwarded for information and necessary action.

2. Arrangements are being made separately to replace Mr. Coelho by another Health Inspector.

(sd.) Raja Abdul Aziz
for State Secretary, Perak.

Mr. Coelho,

You may leave on 30th June but arrange to come back for a handover when the new Health Inspector reports here.

(Sd.) A. Majid
28/6.

Chairman, Town Board.

Noted, Thank you.

(Sd.) Mr. Coelho.

From the above two letters it is clear (and not denied by the respondents) that (1) Mr. Bigley did not send a copy of his letter to the applicant (2) no copy thereof was sent by the State Secretary, Perak to the Town Board Chairman. Consequently, all that the applicant knew, or had means of informing himself, was that his application had been accepted and that he had been selected for the appointment.

The facts in *Coelho*'s case are therefore distinguishable to my mind from the present case where exh. P1 contained a qualification that there was still a document to be further executed.

The differences in the facts that are material could also be detected in the case of *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck & Anor Appeal* [1978] 2 MLJ 239. The facts in the head note are:

In this case the respondent was desirous of buying a house. He went to see the developers (the appellants), chose a house, paid a booking fee of $700 and signed a booking *pro forma*. According to the booking *pro forma* the parties agreed the purchase price of the house at $26,000. The

respondent also agreed that on receiving notice by the respondents he would sign the agreement for sale. Subsequently the appellants informed the respondent that the price of the house was increased to $35,100 because of "amendments to the building plans and increase of material and construction costs." The respondent did not agree to the increased price. The appellants informed the respondent that unless he agreed to pay the deposit based on the increased price, they would cancel the booking and refund the booking fee. The respondent thereupon applied to the court and the High Court gave judgment in his favour and ordered the developers on payment of the balance of the purchase price to transfer the property to the respondent. The appellants appealed.

Syed Othman J (as he then was) in dismissing the appeal referred to the *pro forma* which provided certain details. The case was also decided on the basis that the appellants as developers were bound by the Housing Developers (Control and Licensing) Rules 1970 and therefore bound by them. In my view the case was very much decided on the construction of the *pro forma* itself which was signed by the plaintiffs in that case at the instance of the defendants. The learned judge also ruled that on the construction of r. 10 the purchase price must be stated at the time of booking. In fact there was a very specific passage which could be mentioned here (at p. 240, H-E) where the learned judge stated:

In dealing with the case here, I do not propose to discuss the many authorities concerning "subject to contract" which have been referred to by both sides. As I have stated earlier, the case revolves, as agreed, on the construction of the *pro forma* and on the effect of the rules 10 and 12 of the Housing Developers (Control and Licensing) Rules, 1970. Rule 10 reads:

> 10(1) A purchaser of housing accommodation including the land shall no be required to pay a booking fee of a sum exceeding 2.5 per centum of the purchase price of such housing accommodation including the land.
>
> (2) Notwithstanding paragraph (1) of this Rule, no purchaser of a housing accommodation including the land shall be required to pay a booking fee of a sum exceeding one thousand dollars.
>
> (3) For the purposes of this Rule the term 'booking fee' shall include any payment by whatever name called which payment gives the purchaser and option or right to purchase the housing accommodation including the land.

The provisions of rule 10 are quite clear. The intention of subrule (1) is that the purchase price must be stated at the time of the booking. By subrule (3) the booking fee is to be treated as an option or right to purchase the property at, in my view, the purchase price stated.

Rule 12 lays down that the contract of sale shall be in writing and prescribes the terms and conditions to be contained in the contract of sale. They are rather comprehensive. For the purpose of the present case, I need refer only to subrule (1) paragraphs (g) and (i). The substantive part of paragraph (g) reads:

> ... The price of such land for purpose of adjustment shall be calculated as the same price per square foot as was used to calculate the purchase price stated in the contract of sale and any payment resulting from the adjustment and requiring to be paid by the party concerned shall be so paid within seven days of the issue of the new document of this.

In the *pro forma* the approximate area of the land allotted for the house to be built is stated to be 2,800 square feet and in paragraph 4 of the *pro forma* the purchase price is fixed at $2 per square foot. According to rule 12(l)(g), the defendants may adjust the price of the land depending on the actual measurements shown in the document of title. There is no evidence to show that adjustments were required for this purpose, and I can see no provision whereby the developer can make other adjustments.

Further on he stated:

> Looking at the *pro forma*, I cannot see any single phrase which gives the defendants the right to alter in the house plan. Clause 2 of the *pro forma* gives the right to the plaintiff to cancel the booking in the event of major alterations and amendments to the layout plan. It does not give the defendants such right. As far as I can see most of the requirements of the authorities were in fact in the proposed layout plan. The defence witness himself says in evidence that the layout plan provided reserves for post office, school, market and other amenities as required by the authorities. Considering the clause, even if there were such major alterations and amendments, it would be a matter, not for the defendants, but for the plaintiff whether or not to cancel his booking. Further, I can find no evidence that there was in fact any major alteration to the layout plan.

Therefore with due respect I did not uphold the contention of the counsel for the plaintiff that in the case before me that suggested that upon acceptance of the receipt a contract was concluded. Exhibit P1 could not be put on parity with the *pro forma* in *Daiman*'s case.

In my view whether the price list was sent together or not certainly the terms of exh. P1 were in particulars different from exh. P4. Exhibit P1 could not be described in substance to be similar to the *pro forma* in *Daiman*'s case and the detailed statements of the advertisements in *Coelho*'s case. In the latter case certain letters were not brought to *Coelho*'s attention.

Mention could be made of the case of *G.B. Parker & Ors v. Central Electricity Board* [1967] 4 MC 86 where Raja Azlan Shah J (as he then was) held a circular and advertisement in a newspaper inviting applicants for appointments as officers to be an invitation to treat. The facts were as follows:

> The plaintiffs were recruited in Australia as qualified accountants in the service of the Board. This was in response to an advertisement dated March 23, 1955 which, *inter alia*, stated that the "Recruitment will be on a three-year gratuity-earning contract (renewable) and such officers may be considered by the board after not less than three years' satisfactory service for emplacement on its pensionable establishment under a non-contributory pension scheme.
>
> On September 29, 1955, the plaintiff Kennedy signed the contract which stated, *inter alia*, that the appointment was on gratuity earning contract effective from the date of taking up duty and was for a tour of three years' resident service commencing from that date which might be extended on such terms and such periods which might be mutually agreed (clauses I and II); clause 10 provided for a gratuity on satisfactory completion of service provided the officer concerned was not emplaced on the Pensionable Establishment.
>
> A circular letter dated May 24, 1957 was sent by the Board stating that "... for several years now the recruitment policy and training programme of the board have been directed towards early Malayanisation of Division 1 posts of the board's establishment. Thus in accordance with this policy, since the end of 1955 when it has become necessary to recruit expatriate officers this has been done on contract terms only." The plaintiffs became worried about their positions, and on the assumption that they were non-entitled officers they jointly wrote to the general manager setting out the circumstances which they said gave them reasons to assume that their employment, subject to an initial period of satisfactory service, would be permanent and pensionable. In reply, the general manager wrote stating that the plaintiffs were not considered to be "An entitled officer." Several correspondence ensued thereupon between the plaintiffs and the board. On April 3, 1958 the board wrote to all non-entitled officers, setting out offers either to remain on the present contract terms until the expiration of the current contract or to apply for further employment under a new form of contract. Under the new contract there was no prospect of pension of any kind. It was purely a gratuity contract. The plaintiff Kennedy signed it on July 25, 1958. On September 15, 1958 the board credited the gratuity due to him under the old contract to his bank account. It was this conduct of the plaintiff which was considered as a waiver by the Board. On August 1, 1963, Kennedy and the other plaintiffs wrote to the board asking for their cases to be re-opened.

The sole question before the court was whether by the terms of service and considering the previous practice of the board the plaintiffs had reasonable prospects of appointment to the permanent establishment.

His Lordship in dismissing the plaintiff's claim held that:

(1) the circular and the advertisement were merely an invitation to an offer of employment on a three-year gratuity-earning contract (renewable) with an indication that such officers might be considered for emplacement on the pensionable establishment after a minimum period of 3 years of satisfactory service; they did not give an enforceable right to permanent and pensionable employment;

(2) it was not the circular or the advertisement but the concluded contract between the parties which determined whether the plaintiffs were recruited with reasonable prospects of permanent and pensionable employment. There was no ground for holding that the plaintiffs could reasonably have supposed that their terms of service would give them the legal right to permanent and pensionable employment;

The above cases illustrate that that circulars and advertisements pose different and varying contents. Each document would need to be construed according to the terms set out. As indicated above exh. P1 did not incorporate the terms in detail and as stated above the evidence of DW3 being the person in charge of the documents was accepted on a balance of probabilities. Even assuming the price list was attached the contents of exh. P1 itself did not make any such reference. The court was only invited to conclude what the price was on the basis of the amount of booking fee paid. The court had concluded therefore that exh. P1 did not constitute an offer. The payment of RM3,000 also did not constitute an acceptance of an offer. Neither was the issuance of a receipt conduct which constituted an acceptance of an offer. The combined effect of exh. P1 and P4 was that in exh. P1 there was an invitation to treat in the form of a continuing option. Exhibit P4 was not responded to by the plaintiff. Instead exh. P5 was sent and the contents of which are as follows:

Sila ambil perhatian bahawa anakguam kami tidak setuju dengan harga yang baru iaitu RM230,000.

Anakguam kami telah berjanji dengan pihak tuan bahawa harga belian ialah RM188,000.00 dan beliau hanya akan membayar harga RM188,000.00 untuk bangunan tersebut.

Who then is the promissor and promisee in this letter? "Anakguam kami telah berjanji ..." Was the plaintiff therein making the offer accepted with the issuance of the receipt. In my view the former paragraph constituted a counter offer to exh. P4 and did not comply with the terms of exh. P4 although exh. P4 stated that the offer was valid until 14 November 1995.

No contract was therefore concluded on 21 August 1995. It was found also that nothing cogent was adduced as against the second defendant and it was a futile exercise. Majlis Daerah Pekan, according to exh. D13 a Memorandum of Understanding concluded between the first defendant and second defendant, was then the beneficial owner of land in respect of which the Government of Pahang had granted permission for the development of certain land. The first defendant subsequently concluded a joint venture agreement with the second defendant for the development. The joint venture dated 30 August 1994 but even then at the date of the alleged contract 21 August 1995 there was no nexus whatsoever between the plaintiff and second defendant. Even assuming that a contract had been concluded on 21 August 1995 the first defendant would then not be entitled to implead a defence that it lacked title.

There was however the remaining question of the "tempahan" or booking fee that was paid by the plaintiff to the first defendant. In *Skyline Trading Co. v. Tiow Yoke Lan* [1969] 2 MLJ 212, the respondent had paid a booking fee of $2,000 for a flat on the understanding that she should sign "a contract of purchase" within two weeks of receipt of notice from the vendors. However having informed herself of the terms of the proposed agreement which turned out to be a lease, she rejected the terms of the lease and asked for the refund of the $2,000. The vendors had refused. The respondent commenced action in the Sessions Court where it was dismissed but was successful in her appeal to the High Court which ordered the return of the sum. The vendors (the appellants) appealed to the Federal Court. The Federal Court in dismissing the appeal held that:

(1) The contract of purchase in this case was inchoate of the type where a purchaser of land agreed to purchase subject to a proper contract to be prepared by the vendor's solicitor;

(2) The booking fee in this case was paid on the condition that the amount was to form part of the purchase price in the event that a contract of purchase came to be executed, and as in this case no such contract was entered into the respondent was entitled to refund of the booking fee.

Similarly in the present case before me, exh. P1 in the last paragraph had expressly stated that the booking fee (or bayaran tempahan) was to form part of the purchase price at the time that the sale and purchase agreement was to be executed ("dilaksanakan"). Since no contract had been concluded the amount of RM3,000 paid was the booking fee and was ordered to be returned to the plaintiff.

The claim for specific performance was dismissed with costs, including the costs for the second defendant.